

Deliberate Indifference and Title IX

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I. THE BACKGROUND

Over twenty years have passed since the Supreme Court's decision in [Davis v. Monroe County Board of Education](#) set out the deliberate indifference standard for Title IX claims against a federally funded educational institution for student-student sexual harassment.¹ Yet, at least in the Sixth Circuit, there is still a large difference in opinion about how to interpret and apply the third prong of this standard: whether the funding recipient was deliberately indifferent to the harassment.² This difference is demonstrated by the case of *Foster v. Board of Regents of University of Michigan*.³ Rebecca Foster sued the University of Michigan (the "University") under Title IX, claiming that the University's response to the sexual harassment of her by another student was deliberately indifferent.⁴ The lower court granted summary judgment in favor of the University, and Foster appealed to the Sixth Circuit.⁵ The [first time the Sixth Circuit decided Foster's case](#), it held that the lower court improperly granted summary judgment.⁶ However, the [second time the Sixth Circuit heard Foster's case en banc](#), it decided the lower court was actually correct in granting

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¹ Davis v. Monroe Cty. Bd. Of Ed., 526 U.S. 629 (1999). Title IX provides that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Education Amendments of 1972, 20 U.S.C. § 1681 <https://www.justice.gov/crt/title-ix-education-amendments-1972> [<https://perma.cc/FFD3-KFTU>].

² Davis, 526 U.S. at 650.

³ Foster v. Bd. Of Regents of Univ. of Michigan, 982 F.3d 960 (6th Cir. 2020) [hereinafter Foster II] *vacated en banc* Foster v. Bd. Of Regents of Univ. of Michigan 952 F.3d 765, 779 (6th Cir. 2020) [hereinafter Foster I].

⁴ Foster I, 952 F.3d at 779.

⁵ *Id.*

⁶ *Id.* at 781.

summary judgment.⁷ The difference between the two Sixth Circuit opinions turns on how each panel of judges interpreted the third prong of the deliberate indifference standard. This difference, and the interpretation chosen by the Sixth Circuit, will likely lead to three ramifications: one, victims of student-student sexual assault will be less likely to sue; two, victims will be less likely to win on summary judgment, therefore limiting their bargaining power; and three, universities are disincentivized to respond appropriately to victims claims.

II. THE LAW

As there are many different standards of law in play here, let us take a moment to break them down. First, a motion for summary judgment asks the court to rule in favor for one of the parties because there is no way a reasonable jury could render a verdict against that party, as there is no genuine dispute as to any material fact.⁸ In *Foster*, the lower court found that “it would be simply impossible for a reasonable jury conclude that the University was deliberately indifferent under Title IX and granted summary judgment for the University.”⁹

Second, *en banc* means that the entire bench of judges decides to hear a case.¹⁰ The first time the Sixth Circuit heard the *Foster* case, it only had a panel of three judges.¹¹ The court then chose to re-hear the case with a panel of fourteen judges.¹²

Third, the deliberate indifference standard dictates that a party must show:

1. that the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to an educational opportunity or benefit,
2. that the funding recipient had actual knowledge of the sexual harassment, and
3. that the funding recipient was deliberately indifferent to the harassment.¹³

The Supreme Court in *Davis* elaborated on the third prong by stating that “funding recipients are deemed ‘deliberately indifferent’ to acts of student-on-

⁷ *Foster II*, 982 F.3d at 962.

⁸ *Foster I*, 952 F.3d at 779. Rule 56 of the Federal Rules of Civil Procedure requires that “a movant must show 1) that there is no genuine dispute as to any material fact, and 2) that the movant is entitled to judgment as a matter of law.” *Summary Judgment*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE https://www.law.cornell.edu/wex/summary_judgment [<https://perma.cc/6U7Q-P7GN>].

⁹ *Foster I*, 952 F.3d at 779 (internal quotes omitted).

¹⁰ *En Banc*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE https://www.law.cornell.edu/wex/en_banc#:~:text=French%20for%20%22on%20the%20bench,particular%20court%20hear%20a%20case [<https://perma.cc/57CT-8VKR>].

¹¹ *Foster I*, 952 F.3d at 770.

¹² *Foster II*, 982 F.3d at 961.

¹³ *Foster I*, 952 F.3d at 779 (citing *Davis*, 526 U.S. at 650).

student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.”¹⁴

III. FOSTER V. BOARD OF REGENTS OF UNIVERSITY OF MICHIGAN

The main issue in Foster’s case surrounded the third prong.¹⁵ The majority in *Foster I* and the dissent in *Foster II* used the *Davis* standard in determining that summary judgment was incorrect, finding that a jury could find the University’s conduct clearly unreasonable in light of the known circumstances and therefore deliberately indifferent.¹⁶ However, the majority in *Foster II* appeared to use a good-faith standard interpretation of how to apply the *Davis* standard in determining that summary judgment was correct, as demonstrated by the language of the opinion and the critique of the dissent.¹⁷

A. *Foster I: Summary Judgment was Improper.*

The first time the Sixth Circuit heard Foster’s case, the court recounted the facts of the case, highlighting each time Foster reported the sexual harassment to University officials and the response of the officials.¹⁸ After considering those facts, the court concluded in a two-to-one decision that there was a genuine dispute of material fact regarding the third prong: whether the University was deliberately indifferent to Foster’s plight.¹⁹ The court found that a reasonable jury could conclude that the University’s response was clearly unreasonable in light of the known circumstances.²⁰ The court summarized five separate actions of the harasser and reactions of the University and pointed out that a reasonable jury could find for either party in all five situations.²¹

B. *Foster II: Just Kidding, Summary Judgment was Proper!*

The second time the Sixth Circuit heard Foster’s case, the court viewed the facts through a good-faith standard.²² After reviewing the facts, the court found that University was no deliberately indifferent because they had responded at all.²³ This approach did not seem to consider whether a jury could go either way on whether the behavior was clearly unreasonable in light of the circumstances. The dissent, written by the same judge who wrote the majority opinion in *Foster*

¹⁴ *Davis*, 526 U.S. at 648.

¹⁵ *Foster I*, 952 F.3d at 779; *Foster II*, 982 F.3d at 962.

¹⁶ *Foster I*, 952 F.3d at 779; *Foster II*, 982 F.3d at 972–89 (Moore, J. dissenting).

¹⁷ *See generally Foster II*, 982 F.3d 960.

¹⁸ *Foster I*, 952 F.3d at 783–88.

¹⁹ *Id.* at 771–72.

²⁰ *Id.* at 791.

²¹ *Id.* at 783–88.

²² *See generally Foster II*, 982 F.3d 960.

²³ *Id.* at 966–67.

I, reiterated her arguments for the correct interpretation. She stated that funding recipients are deemed ‘deliberately indifferent’ to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.”²⁴ Another dissenter “emphasize[d] the [dissent’s] observation that the majority's seeming application of a good-faith standard is unmoored from any applicable legal precedent.”²⁵

IV. THE CONCLUSION

The official interpretation of the *Davis* deliberate indifference standard in the Sixth Circuit is a good faith basis. The *Foster I* decision and *Foster II* dissent present a compelling argument that the correct interpretation is whether the institution’s response is clearly unreasonable in light of the circumstances. The takeaway from the *Foster* cases seems to be if a university makes a good-faith (but potentially unreasonable in light of the circumstances) response to a claim of student-student sexual harassment, the University is likely to win on a summary judgement motion. The court’s stance on how to interpret deliberate indifference will likely lead to at least three concerning ramifications. One, victims of student-student sexual harassment will be even less likely to sue universities under Title IX. The bar that universities must meet to be considered compliant, i.e., not deliberately indifferent, has been lowered by the Sixth Circuit’s decision in *Foster II*. Two, even if a victim decides to take the risk and sue their university, they are less likely to win on summary judgment. This results in a reduction of the victims bargaining power in settlement negotiations.²⁶ Three, because the accountability mechanism of a lawsuit has been so weakened (see first two ramifications), universities will not respond to victims claims appropriately. If the *Foster I* decision had not been vacated, student victims of sexual harassment would be in a far better position than they are today.

²⁴ *Id.* at 981 (Moore, J. dissenting).

²⁵ *Id.* at 989 (White, J. dissenting).

²⁶ “Put simply, the settlement value of a case increases when a motion for summary judgment is denied. Thus, denials of summary judgment up the ante in the litigation game.” Edward Brunet, *The Efficiency of Summary Judgment*, 43 LOY. U. CHI. L. J. 689, 689 (2012) [<https://perma.cc/PG2R-4F3U>].